

NTSB Order No.
EM-27

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 6th day of December 1972.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

ALBERT M. TORREGANO Appellant.

Docket ME-28

OPINION AND ORDER

The appellant, Albert M. Torregano, has appealed from the decision of the Commandant affirming the revocation of his merchant mariner's document (No. Z-1281076) and all other seaman's documents for misconduct aboard ship.¹ He was serving at the time as a deck utility seaman on the SS CRISTOBAL, a merchant vessel of the United States.

Appellant's prior appeal to the Commandant (Appeal No. 1873) was from the initial decision of Coast Guard Examiner Archie R. Boggs, rendered after a full evidentiary hearing.² Throughout the proceedings herein, appellant has been represented by his own counsel.

The examiner found that on June 28, 1969, appellant assaulted and battered a fellow crewmember, William O. Thomas, with a hammer, while the vessel was docked at Cristobal, in the Panama Canal Zone. Prima facie weight was assigned by the examiner to documentary evidence showing that, subsequently on the same date, appellant was convicted by the magistrate's court in Cristobal, acting on Thomas'

¹The Commandant's revocation action was taken pursuant to 46 U.S.C. 239(g). The appeal therefrom to this Board is authorized under 49 U.S.C. 1654(b)(2) and governed by the Board's rules of procedure set forth in 14 CFR 425.

²Copies of the decisions of the Commandant and the examiner are attached hereto.

sworn complaint,³ and logged for this offense aboard ship. In addition, he accepted the testimony of the complaining witness at the hearing and four other supporting witnesses, two of whom observed the hammer attack, finding the case against appellant "proved by reliable, probative, and substantial evidence." He rejected appellant's defenses of prior provocation by Thomas and self-defense.

In assessing sanction, the examiner made further findings that the attack was vicious in nature and resulted in serious injury. He concluded that appellant displayed "dangerous propensities" and that other seamen should not be exposed to possible similar attacks at his hands in the future, and thereupon entered the order of revocation. Appellant's good prior record as a seaman was limited to 1 year of service and was not considered a factor in mitigation.

In support of his appeal, appellant has filed the same brief submitted on his prior appeal to the Commandant. We reject at the outset his contentions that the examiner was required to weigh the evidence according to the criminal standard of proof beyond a reasonable doubt because he was charged with misconduct of a criminal nature; also, that his hearing lacked "substantive" due process because in applying a lesser standard the examiner failed to make an independent adjudication of his guilt or innocence respecting the charge.

These contentions are founded on a misconception. The adjudicative process for Federal agency actions leading to sanctions, and the degree of supporting proof therein, is governed by the Administrative Procedure Act. The examiner has not adjudicated appellant's criminal liability nor was he authorized to do so.⁴ Thus, in reviewing the initial decision, our sole concern is whether the examiner satisfied the Act's requirements that all relevant evidence of record is to be weighed, and any such evidence must be "reliable, probative, and substantial" in order to support his findings and order.⁵

The statutory scheme is not lacking in essential fairness merely because the burden of proof would be greater in criminal

³Although Thomas' complaint alleged that appellant struck him "about the head and arms with a hammer," the court records show that appellant was charged and convicted for the lesser included offense of battery under the Canal Zone Code.

⁴46 U.S.C. 239(h).

⁵5 U.S.C. 556(d); see also, 46 CFR 137.20-95(c).

cases. A similar difference prevails between the respective burdens in criminal and civil cases arising from the offense involved herein.⁶ Because a lower order of interest is at stake in civil cases, the concomitant requirements of proof are less stringent than in criminal cases. The reason for this principle is sound and applies equally to appellant's hearing in this class of cases, and we do not find that it offends due process.

Appellant's other contentions are that: (1) his criminal conviction was not properly in evidence because he was not represented by counsel in that proceeding; (2) his own testimony refuted that of Thomas and showed his "right to self defense"; (3) further rebuttal evidence established that he had good character traits, whereas Thomas was known for aggressive behavior; (4) the two eyewitnesses did not testify that he actually struck Thomas with the hammer; (5) two other prospective eyewitnesses were not called, and the hammer was not produced; and finally, (6) the log entry is defective because it does not show that he was advised "of his right to remain silent," and his recorded reply to the offense stated therein is incomplete. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we conclude that the examiner's findings are supported by reliable, probative, and substantial evidence, and by the weight of such evidence. We adopt the examiner's findings, to the extent not modified herein, as our own. Moreover, we agree that revocation is warranted for appellant's misconduct.

We attach little weight to the documentary evidence in making the foregoing determinations. The court record indicates that upon appellant's conviction for the minor crime of battery,⁷ after pleading guilty, he was fined \$50 and released. This does not reflect the true gravity of his offense brought out by the witnesses at his hearing, although the light criminal sanction does obviate appellant's objection to the court record as evidence.⁸

⁶6Am. Jur. 2d, Assault and Battery, section 207.

⁷Section 332(a) of Title 6, Canal Zone Code, defines the crime of battery as "any willful and unlawful use of force or violence upon the person of another" which is punishable under subsection (b) by a fine of not more than \$100 or imprisonment in jail for not more than 30 days, or both.

⁸In addition to the citations disposed of by the Commandant, which we agree are not supportive of appellant's objections to the criminal proceeding as a denial of due process, he also cites

Conversely, the logbook entry fully reflects appellant's offense as found by the examiner. We also find appellant's objections to this evidence are unfounded, since the master's procedure in recording the log and appellant's reply thereto conformed substantially to statutory requirements,⁹ and appellant has raised no relevant inconsistencies between his actual reply and this record. In our view, both the log, made up of unsworn statements, and the criminal record are prima facie evidence of appellant's misconduct. However, we turn to the testimonial evidence as a basis for holding that appellant's affirmative defenses were met in this case.

The testimony is undisputed that shortly before 8:00 a.m., Thomas was sleeping on top of a wooden box located on deck when he was awakened and accosted by appellant. In Thomas' version, appellant immediately began striking at him with a hammer. Thomas attempted unsuccessfully to ward off the blows with his arms but received wounds and bruises on his forehead, shoulder, and over the ear, as well as on his arms and wrists. According to two other crewmembers who testified, appellant was carrying the hammer as he passed by them on deck, heading for the place where Thomas was sleeping. Shortly afterwards, they heard a commotion from that direction and saw appellant swinging the hammer at Thomas, while the latter was backing away and protecting his face with his hands. Although they could not tell whether the blows actually landed on Thomas, they did observe blood on Thomas' forehead after being separated from appellant. The master, to whom Thomas made a prompt report, testified that blood was oozing slowly from his forehead and that he had various swellings, particularly around one ear, and obvious arm damages. The extent of his injuries was also corroborated by the chief mate, who arranged for Thomas' hospital treatment ashore.

Appellant's testimony in rebuttal differed materially in two respects. In the first place, without controverting the fact that Thomas' injuries were inflicted by him, he claimed that the attack was fists rather than a hammer. The finding that Thomas was battered with the hammer is supported by Thomas' testimony and, in our view, by the weight of eyewitness corroboration. Moreover, we do not consider the means employed significant. The seriousness of

the recent Supreme Court decision of Argersinger v. Hamlin, 92 S. Ct. 2006 (1972). That case, which established the right of counsel when any imprisonment is imposed by a court, is also inapposite.

⁹The master read the log to appellant and asked if he had anything to say in reply. No warning of a right to remain silent was necessary. 46 U.S.C. 701, 702.

the victim's injuries by either means would attest to the brutality of his attack, and, in the absence of a legally sufficient defense, either method of attack would support the sanction.

Secondly, according to appellant, he resorted to the hammer only after Thomas reached for a fireaxe and was swinging it only to scare him away from the axe. Assuming this was intended to raise an issue of self-defense, it was also in direct conflict with the observations of the eyewitnesses. Since no ground for impeachment of their testimony is even raised and appellant's version is wholly uncorroborated, we have no hesitancy in ruling out appellant's use of the hammer in self-defense.

Concerning the defense of provocation, appellant testified that on the previous evening around midnight, while he was in a drunken condition in one of the town bars. Thomas had pushed him off a stool to the floor and also hit him after getting up. This portion of his testimony was corroborated by two eyewitnesses, while two other crewmembers told of previous acts of belligerence by Thomas toward them. It was not shown that Thomas did any physical harm to appellant or the others in these previous encounters, and, although some form of physical retaliation would undoubtedly be justified after the barroom incident, we find that appellant's retaliatory attack the next morning aboard ship was so excessive and so delayed as to nullify any such defense.

The remaining evidence consisted of letters of reference attesting to appellant's good character. Upon review, they provide neither refutation nor mitigation, of his misconduct. We also find that the weight and sufficiency of proof adduced by the Coast Guard sustains the sanction, establishing to our satisfaction that appellant was the only aggressor in this instance, while Thomas was virtually defenseless, offered no resistance, and sustained serious resultant injuries. We affirm the sanction in order to remove appellant from the shipboard environment, where the brand of violence he has displayed, acting purely out of vengeance, would continue to threaten the welfare and safety of other crewmembers.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied and;
2. The orders of the Commandant and the examiner revoking appellant's seaman's documents be and they are hereby affirmed.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)

